

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALVIN RANKIN, JR.,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:09-cv-00145-LRH-VPC

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court for a final decision.

Background

Petitioner Alvin Rankin, Jr., challenges his 2005 Nevada state conviction, pursuant to a jury verdict, of one count of conspiracy to commit robbery, one count of robbery with the use of a deadly weapon, and two counts of attempted robbery with the use of a deadly weapon as well as his adjudication and sentencing as a habitual criminal. He challenged his conviction in the state courts on direct appeal and on state post-conviction review.

The summary of the trial evidence below serves as backdrop to the Court's discussion of all of the claims presented, but the summary is framed in particular for the discussion of Grounds 2 and 3(c).

In Ground 2, petitioner alleges that he was denied rights to present a defense and to a fair trial because the trial court barred the defense from establishing on cross-examination that the police had not conducted gun shot residue or blood spatter testing to determine whether there was physical evidence connecting Rankin to the robbery. The state supreme court held that the trial court erred but that the error was harmless. The harmless issue is addressed on federal habeas review under the

1 standard in *Brecht v. Abramson*, 507 U.S. 619 (1993). Under that standard, the question is whether the
2 error had substantial and injurious effect or influence in determining the jury's verdict.

3 In Ground 3(c), petitioner alleges that he was denied effective assistance of trial counsel when
4 counsel did not have his clothing tested for gunshot residue and/or blood spatter.

5 Shortly after midnight on July 3, 2004, Victor Sangines, Jesus Lera and Mario Sangines were
6 subjected to a robbery or attempted robbery by two black males in the parking area outside the
7 Sangines' apartment. The State's theory at trial was that petitioner Alvin Rankin was the robber
8 referred to as the "second robber" during trial testimony. The defense maintained that Rankin had been
9 mistakenly identified as one of the robbers. There was no physical evidence linking Rankin to the
10 robbery.

11 The trial evidence tended to establish the following.¹

12 According to Victor Sangines' testimony, the incident occurred at approximately 12:30 a.m.
13 right after he had parked his vehicle at the apartment building. The apartment building was on Tara
14 Avenue between South Arville Street and South Valley View Boulevard, closer to the Arville end of
15 the block. The location was in the central Las Vegas valley, approximately a mile west of the north end
16 of the Las Vegas Strip, on the other side of the interstate that divides the central valley. The apartment
17 building was on the north side of Tara facing the street to the south, and Sangines was parking the car
18 on the north and back side of the building in a private alleyway and parking area. Victor Sangines had
19 been driving; his brother Mario was sitting in the rear passenger seat behind him; and Jesus Lera was
20 sitting in the front passenger seat.²

21 As Victor Sangines was exiting from the driver's side, a man came from behind a van that was
22 parked in the next space. As he saw the man, the "first robber," the man pulled a revolver from under
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24 ¹The Court makes no credibility findings or other factual findings regarding the truth or falsity of evidence or
25 statements of fact in the state court. The Court summarizes same solely as background to the issues presented in this
26 case, and it does not summarize all such material. No statement of fact made in describing statements, testimony or
27 other evidence in the state court constitutes a finding by this Court. Any absence of mention of specific evidence does
28 not signify that the Court has overlooked the evidence in considering petitioner's claims.

²#29, Ex. 28, at 5-16, 27-28, 31& 43-51. The location was due west of a point on the Strip between the Riviera
Hotel and Casino and the former Sahara Hotel and Casino.

1 his T-shirt and pointed it at Sangines. At this point, the first robber was standing at the front of the car
2 near the left headlight, with the still open driver's side door between them. Sangines testified that the
3 first robber "was pointing the gun right in my chest and my face." He testified that "I kind of stare in
4 the gun, you know, I thought he was gonna shoot right way" and that "I was kind of scared."³

5 Sangines testified that at "that exact moment" a second man came from behind the van and
6 walked over to the right front corner of the car. The second man, the "second robber," was giving
7 orders to the first robber. When asked whether the second robber was also carrying anything in his
8 hands, Sangines replied: "I didn't see clear one hand." He testified that "I just saw one hand, because
9 he was waving."⁴

10 On cross-examination, Sangines elaborated further:

11 Q. Did he – did you ever see that second individual with a gun?

12 A. No, because he was – first of all, I was putting my attention on
13 the gun [being pointed at him by the first robber]. I was staring
14 at the gun first and I just saw the guy coming out and stay over
there and the guy who came behind, he was giving orders to the
guy with the gun.

15 #29, Ex. 28, at 58.

16 At this point, Victor Sangines' younger brother Mario was trying to get out of the car from
17 behind Victor, but he tripped as he was doing so. The second robber started yelling something along
18 the lines of "shoot him, they gonna' get something from the car, they got a gun" suggesting that Mario
19 was reaching for a gun. Victor turned to help his brother, who was at high risk for excessive bleeding
20 because of medication that he took after prior heart surgeries. As Victor turned to help his brother, he
21 felt the first robber's gun right behind his ear.⁵

22 Both robbers then were yelling "we want the money." Victor Sangines reached into his pocket
23 with his fingers, pulled out his tip money from his cab fares that night, and gave it to the first robber.
24 His brother Mario told the men that he did not have anything, and he showed the first robber his empty
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26 ³#29, Ex. 28, at 9-11, 32-33, 51-54 & 56-57. As discussed *infra*, the headlights on the parked vehicle were off.

27 ⁴#29, Ex. 28, at 9-11.

28 ⁵#29, Ex. 28, at 12-14, 33, 60-63 & 65.

1 wallet. At about this point, Jesus Lera was trying to get out of the passenger side at the urging of the
2 second robber. Victor Sangines could not see if Lera gave the second robber any money.⁶

3 The first robber then started pushing Victor Sangines with the gun behind his ear, trying to move
4 the men to the back of the car. The second robber was yelling to the first to “shoot them, they’re going
5 to run away.” At the back of the car, the first robber told them to get down on the ground. Mario said
6 to Victor that the robbers were going to kill them, but Victor said that they would not because they had
7 got what they wanted. He pushed his brother down and lay partially on top of him to protect him.⁷

8 At approximately this point, Victor Sangines saw Jesus Lera at the back right taillight. Lera did
9 not appear to want to go down, like he was scared and wanted to run. Sangines testified that Lera had
10 his hands on the trunk, and that he knew that the second robber “was having something in the back of
11 Jesus or something like that, because he couldn’t move.”⁸

12 Sangines’ related cross-examination testimony similarly left some ambiguity in the manner in
13 which the second robber was controlling Lera’s movement:

14 Q. You indicated you never did actually see him with a gun, that
15 second gun?

16 A. No, but he was holding Jesus.

17 Q. He was dealing directly with Jesus, right?

18 A. Yes.

19 #29, Ex. 28, at 66.

20 As they were moving, Sangines felt the gun muzzle move to the back of his neck. As he was
21 going to the ground, he felt a “very strong impact” on the back of his head. He thought that it may have
22 been the gun because he did not feel it being pressed to his neck anymore, but he did not know for sure.⁹

23 / / / /

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25 ⁶#29, Ex. 28, at 14-16 & 63-65.

26 ⁷#29, Ex. 28, at 16-20, 33-34 & 64-68.

27 ⁸#29, Ex. 28, at 20-21, 65-66 & 69.

28 ⁹#29, Ex. 28, at 18-19 & 67-68.

1 After he was hit in the back of the head, Victor Sangines went to the ground “and suddenly I
2 hear a shot.” He was face down; and he did not see Lera, the shot being fired, or who fired the shot.
3 Sangines then felt himself being kicked, but he did not see who was kicking him.¹⁰

4 After the shot, the Sangines brothers jumped up, and Mario started yelling to call the police.
5 At this point, Lera was on his knees. The two robbers started to run. Victor Sangines gave chase for
6 a few feet, but one of the robbers fired another shot, prompting Sangines to stop. He was not sure which
7 one of the robbers fired the second shot as they were running.¹¹

8 The robbers ran south between the apartment buildings and across Tara. They then split up with
9 one going west (toward Arville) and the other southeast between buildings (toward Valley View).¹²

10 When Victor Sangines returned to the other two men, they saw that Lera’s arm was bleeding.
11 Mario again told Victor to call the police, reminding him that he had a cell phone in his pocket. Victor
12 testified that he had been so excited that he forgot that he had his cell phone in his pocket. He further
13 testified that he was so excited that he told the 911 dispatcher instead that he had been shot.¹³

14 The initial responding police officer was on patrol very close to the location. He arrived while
15 Victor Sangines still was describing to the 911 dispatcher what had happened.¹⁴

16 Mario Sangines or Sangines Diaz testified substantially along the lines of his older brother’s
17 testimony regarding the incident through to the 911 call. Mario even more clearly stated a belief that
18 both robbers had a gun, although he ultimately acknowledged that he did not actually see a second gun:
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20 ¹⁰#29, Ex. 28, at 19-21 & 68-71.

21 ¹¹#29, Ex. 28, at 21-23 & 70-72.

22 ¹²#29, Ex. 28, at 23, 28-30 & 72.

23 ¹³#29, Ex. 28, at 23-24 & 72-73.

24 ¹⁴#29, Ex. 28, at 25 & 42 (Sangines), *id.*, Ex. 29, at 8-13 (Officer Kusiak).

25
26 The Court will summarize each victim’s remaining testimony more particularly related to identification after
27 outlining the three victims’ principal testimony regarding what happened during the incident itself. That is, the Court
28 focuses first on testimony that either: (a) possibly would place a gun in the second robber’s hand, such that he could
have been the shooter; or, (b) if not, would have the second robber standing close enough to the shooter that gunshot
residue and/or blood spatter potentially may have been deposited also on the second robber and/or his clothing.

- 1 Q. Could you see who was shooting [the first shot]?
- 2 A. This guy [which is how the witness had been referring to the
- 3 defendant at trial] – I don’t see who is shooting, because I was in
- 4 the ground.
- 5 Q. Of the two guys the one that had the gun to Victor’s head and the
- 6 Defendant, which one had a gun?
- 7 A. I think both have guns.
- 8 Q. You saw both with a gun, yes?
- 9 A. Yes.
- 10 MR. PERCIVAL: Objection. Leading.
- 11 MR. LEWIS: He’s shaking his head. I’m getting him to
- 12 say yes or no.
- 13 Q. You saw both of them with a gun?
- 14 A. Yeah, this guy, he –
- 15 Q. This guy told what?
- 16 A. He show me with his hands to the other guy, what he need to do.
- 17
- 18 Q. When did you first notice that the Defendant had a gun?
- 19 A. You know, when I was back in the car, I looking like this and I
- 20 see it.
- 21 Q. Do you remember what color or what kind of gun?
- 22 A. I don’t see the gun. I see him. He was like this.
- 23 Q. When you say he was like this you’re holding your hand like
- 24 you’re holding something, pointing?
- 25 A. Yeah.

#29, Ex. 28, at 95-96.

Jesus Lera,¹⁵ also testified to substantially the same events, but not in exactly the same sequence or order. Lera has both robbers moving more in unison and in close proximity to one another. Under

¹⁵With regard to spelling, the transcript at the preliminary hearing has the witness spelling his name, through an interpreter, “L-e-r-a” whereas the trial transcript has him spelling his name “L-a-r-a.” Both are common surnames.

1 Lera's testimony, the two robbers first dealt with the Sangines brothers and moved them to the back of
 2 the car. The two robbers then together made Lera exit the vehicle, moved him to the back of the
 3 vehicle, and began hitting and kicking him. He testified that "they" hit him in the head with a gun and
 4 that he raised his arms to protect his head. According to Lera, he was shot in the arm while he was
 5 holding his arms up by his head in this defensive position, while down on one knee.

6 On cross-examination, defense counsel was able to secure, at least initially, testimony from Lera
 7 placing the second robber over by Victor Sangines at the time that Lera was shot. However, when
 8 counsel then asked the ultimate question as to whether the first robber was closer, Lera hedged:

9
 10 Q. The first guy was closer to you than the second guy was when
 you were at the back of the car?

11 A. Yes, a little bit.

12 #29, Ex. 28, at 132. Counsel thereafter elicited testimony from Lera that he was "almost sure" that it
 13 was the robber "of the blue shirt" who shot him:

14 Q. You didn't see which one of the two individuals actually shot
 15 you, right?

16 A. Yeah. Well, I kind of looked out and I'm almost sure it was the
 guy of the blue shirt.

17 Q. You're almost sure?

18 A. Yes.

19 #29, Ex. 28, at 134.¹⁶

20 Picking back up with the time line, Officer Mark Kusiak was the officer who arrived first on the
 21 scene, while Victor Sangines still was talking to the 911 dispatcher. Officer Kusiak described Sangines'

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 23 ¹⁶Clothing colors are discussed in the text, *infra*, at 8, and in particular with respect to Lera, at 13-14.

24 No expert testimony was tendered in the state or federal record suggesting how far away a second individual
 25 could be from the shooter and still potentially be deposited with gunshot residue and/or blood spatter. The Court would
 26 note, however, that: (a) the distance across the rear end of a pre-2005 two-door Chevrolet Malibu Classic (see #29, Ex.
 27 28, at 89) likely would not be substantially more than five to close to six feet; and (b) given the imprecise placement of
 the two robbers in the testimony, it would be difficult based on that testimony alone to wholly rule out the possibility of
 both men being close enough to the shooting of Lera to possibly have been the subject of deposited gunshot residue
 and/or blood spatter. The Court additionally notes that both the gunshot and any resulting blood spatter initially would
 have been relatively high off the ground, with Lera being hit in the arm while shielding his head with his arms and being
 down only on one knee.

1 demeanor as “having what we call high speed wobbles” or “hyper.” He was speaking very rapidly and
2 going back and forth from one idea to another sporadically.¹⁷

3 Victor Sangines gave Officer Kusiak descriptions of the two robbers, using numerical height
4 and weight references as well as comparisons to his own height and weight. Officer Kusiak described
5 Sangines as being “probably about 5'6", 5'7", maybe about 210, little wider build.”¹⁸

6 Sangines described what Kusiak referenced as “subject number one” and “subject number two.”
7 The record does not reflect that this “subject” order dovetails neatly with the “first robber” and “second
8 robber” order in which the Sangines brothers and Lera referred to the robbers at trial.¹⁹

9 Sangines described “subject number one” as being a 5'10" black male, but then immediately
10 thereafter he said “about my size.” Kusiak pointed out to Sangines that he was not 5'10" but instead
11 was “more 5'6", 5'7", in that area.” Sangines said “okay.” Sangines estimated the weight of subject
12 number one as “about 220, 210 pounds” and said that he was wearing a “black T-shirt, black pants.”²⁰

13 Sangines described “subject number two” also as a 5'10" black male, and he further stated that
14 he was 185 pounds with a “read [sic] T-Shirt, blue pants.”²¹

15 Officer Kusiak radioed these descriptions to the dispatcher who relayed them to other officers
16 who were setting up a perimeter as Kusiak was speaking with Sangines.²²

17 As Kusiak and Sangines had been speaking, within a matter of only minutes from the first initial
18 dispatch, four officers in patrol cars had created a perimeter around several blocks with apartment
19

20 ¹⁷#29, Ex. 29, at 12-13.

21 ¹⁸#29, Ex. 29, at 22. Mario Sangines and Jesus Lera were being given medical attention during this time.

22 ¹⁹Cf. #29, Ex. 29, at 56 (referring to “first subject BMA, 5'7", 220 pounds, black shirt and black pants *with a*
23 *black revolver*” and to “second subject, the same, BMA, 5'10", 180, red T-Shirt and blue pants”)(emphasis added). In
24 the context of the trial testimony, it might be expected instead that the second subject would be identified, at least per the
25 trial testimony, as having the black revolver. See also #29, Ex. 33, at 81-82 (similar description of the transcript of the
initial 911 call, which transcript does not appear to have been made of record in this federal habeas proceeding).

26 ²⁰#29, Ex. 29, at 24-25.

27 ²¹#29, Ex. 29, at 25.

28 ²²#29, Ex. 29, at 15 & 23-25.

1 buildings in the directions in which the robbers had fled. The rectangular perimeter was bounded by
 2 the north-south streets of Arville and Valley View and the east-west streets of Tara and Pennwood
 3 Avenue, which was two blocks south of Tara. Each officer stationed his cruiser at one of the four
 4 intersections, used his overhead lights to illuminate the corner, and then shone the two side spotlights
 5 respectively down the two streets bounding that corner of the rectangle. That way, the four officers
 6 collectively were able to see persons on or crossing the perimeter streets into or out of the area.
 7 Meanwhile, canine-assisted patrols were searching the interior area of the perimeter on foot.²³

8 Within eight minutes of the 00:24 a.m. initial dispatch, Officer Kusiak began receiving radio
 9 calls that officers had possibly involved persons in custody. He took Victor Sangines to three different
 10 field showups at or near corners of the perimeter. For the showups, Kusiak told Sangines that the
 11 subjects would not be able to see him in Kusiak's cruiser because the headlights, overhead takedown
 12 lights, and spotlights all would be shining toward the subject. Kusiak further told Sangines:

13 [W]hen we do get to the location of where these people are at, I
 14 need a hundred percent answer "Yes, this is the person" or "No, this is
 15 not the person."

16 If you have any doubt in your mind, you need to let me know. I
 17 cannot make an arrest or take that person into custody with some doubt.

18 Has to be 100 percent yes, 100 percent no.

19 #29, Ex. 29, at 9,12, 17-18 & 26-27.

20 Officer Kusiak first took Sangines to a showup at the southwest corner of the rectangle, at
 21 Arville and Pennwood. When the subjects were placed in front of the vehicle, Sangines immediately
 22 said: "No, not involved."²⁴

23 Meanwhile, Officer Barry Hinote had set the perimeter at the southeast corner of the rectangle,
 24 at Valley View and Pennwood. He arrived there at approximately 00:29 a.m., within five minutes of
 25 the initial dispatch. Within a minute of his arrival, only six minutes from the first dispatch, Officer
 26 Hinote saw an individual who he identified at trial as Alvin Rankin step out of the shadows, between

27 ²³#29, Ex. 29, at 14-17 & 29 (Officer Kusiak); *id.*, at 45-46 (Officer Hinote).

28 ²⁴#29, Ex. 29, at 19.

1 one of the apartment buildings and a van and walk east on the sidewalk on the north side of Pennwood
2 toward his vehicle.²⁵

3 Officer Hinote believed that Rankin fit one of the descriptions that he had been given, and he
4 requested Rankin to come over to his patrol car. Rankin put his hands in the air, walked to the front of
5 the vehicle, and laid his upper body across the hood. He was perspiring profusely and appeared
6 exhausted, with the officer observing that his heart was beating rapidly. Rankin was wearing all black
7 clothing. He was covered in what appeared to be brown dirt, “[m]ostly on the front of his torso and
8 upper thighs.” He had a new scratch or “deep . . . laceration like a cut of some kind” across the bottom
9 of his Adam’s apple. He also had a fresh, open wound to the palm of his right hand.²⁶

10 The straight line distance between the scene of the incident and the corner of Valley View and
11 Pennwood would appear to be less than a half mile. An individual walking at a brisk five mile per hour
12 pace would cover a straight line distance of less than a half mile in under six minutes.²⁷

13 As Officer Kusiak was bringing Victor Sangines around a few minutes later, Officer Hinote had
14 Rankin stand in front of his patrol car facing out toward the other vehicle. Rankin’s hands were
15 handcuffed behind his back, but the handcuffs would not be visible to the occupants of the other
16 vehicle. Hinote stood besides Rankin with his own arms also behind his own back, to create an
17 appearance that both men simply were standing in a similar position with their arms behind their back.²⁸

18 After Officer Kusiak drove up and stopped the vehicle, Sangines immediately said: “Yes, he is
19 one of the gentlemen that was involved.” Officer Kusiak described the subject at the second showup
20 as “a black male, approximately five foot seven, to me he looked to be about 185 pounds, black T-Shirt,
21 black pants.” The officer further observed:

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23 ²⁵#29, Ex. 29, at 46-47 & 54.

24 ²⁶#29, Ex. 29, at 48, 52-56 & 60-61.

25 ²⁷The directions feature on www.maps.google.com reflects that the driving distance from the address on Tara is
26 approximately .4 miles east on Tara and then approximately .15 miles south on Valley View. The Court’s math would
27 suggest a straight line distance of approximately .427 miles. Accord #29, Ex. 29, at 9-10 & 25-26 (testimony regarding
the approximate distance from a position just north of Tara on Valley View to the scene of the incident).

28 ²⁸#29, Ex. 29, at 49-51 (Officer Hinote); see also *id.*, at 28-29 (Officer Kusiak).

1 “[H]e was sweating profusely. His chest was pounding up and
2 down like he had just did running or high exertion type activity.”

3 #29, Ex. 29, at 19-20, 27-28 & 30 (Officer Kusiak refers to Sangines making the positive identification
4 “the moment I stopped my vehicle”).

5 Officer Kusiak thereafter took Sangines to a third showup at Silver Dollar Avenue and Valley
6 View, which was to the north of the second showup at approximately half the distance to Tara.
7 Sangines stated that the individual at the third showup was not involved.²⁹

8 At trial, Victor Sangines identified Alvin Rankin on direct examination as the second robber.
9 Sangines testified that Rankin was wearing baggie black pants and a dark T-shirt at the time. He could
10 not recall whether Rankin was wearing anything on his head. He described Rankin’s hair as short and
11 his face as “kind of rough . . . like he didn’t shave.” He placed his weight at “maybe 180.”³⁰

12 In his testimony at trial, Victor Sangines still was describing himself as 5'10" tall when
13 comparing his height to that of the robbers:

14 Q. How tall are you?

15 A. About 5'10".

16 Q. And the two people that you saw that night, the first night [sic]
17 that you saw them, compared to you was he taller or shorter?

18 A. We can still come out the same size, a little bit shorter, but about
the same size.

19 Q. What about the Defendant; do you think he’s taller or shorter?

20 A. I think he’s about the same size, to me.

21 #29, Ex. 28, at 36; see also *id.*, at 57 (again using 5'10" as the supposed common height).

22 Sangines stated that he was facing the second robber after his brother tripped getting out of the
23 car and the second robber was yelling to shoot him. After defense counsel later inquired on cross-
24 examination about Sangines’ degree of attention with a gun pointed at him, Sangines referred back to

26 ²⁹#29, Ex. 29, at 20. Silver Dollar is an east-west street approximately halfway between Pennwood and Tara.
27 Silver Dollar was the only east-west street within the perimeter established that crossed all the way from Valley View to
Arville.

28 ³⁰#29, Ex. 28, at 11-12, 26, 33, 57-60 & 73-78.

1 the same point where the second robber was saying to shoot his brother Mario after he stumbled.
2 Sangines stated: “I was staring at the Defendant. That’s when I stare at him, because I was looking right
3 at him.”³¹

4 Sangines testified that “I think it was like three” people at the first showup, just Rankin at the
5 second showup, and one person at the third showup. He testified that Rankin was wearing the same
6 dark T-shirt and baggie pants that he had described and that he “was very sweaty and kind of dirty” at
7 the time of the second showup. At trial, he could not recall an extensive amount of specifics regarding
8 the four persons collectively at the first and third showups, but he stated that none of the four were one
9 of the two robbers.³²

10 When defense counsel framed a question on cross-examination in terms of Victor Sangines’
11 having identified Rankin as someone he “believed was involved in the robbery,” Sangines responded:
12 “Yes. I was very sure.”³³

13 When asked how sure on redirect, he responded: “Hundred percent.”³⁴

14 Both Mario Sangines and Jesus Lera had been examined and then taken away for medical
15 attention while Victor Sangines was providing a description to officers and viewing the showups.

16 At trial, Mario Sangines testified as follows regarding his description and identification of the
17 second robber. He told the police at the hospital that: (a) he did not know whether the second robber
18 had facial hair or not because it was too dark; (b) the second robber was shorter than the first robber but
19 both similarly were of a muscular build; and (c) he would be able to identify the men again because “I
20 see his face close.” Sangines identified Rankin at trial as the second robber. He based his identification
21 on having been focused at the time on the second robber’s face when it was in the light at one point,
22 rather than upon what the two robbers were wearing. He maintained, referring to Rankin at the trial,
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24 ³¹#29, Ex. 28, at 33 & 60-63.

25 ³²#29, Ex. 28, at 37-40 & 78-83. Sangines was able to recall a number of specifics regarding other individuals
26 at the showups; he just did not recall an extensive amount of such specifics.

27 ³³#29, Ex. 28, at 82.

28 ³⁴#29, Ex. 28, at 85.

1 that “I see this guy close.” When asked on redirect how sure he was that Rankin was the second robber
 2 that he saw that night, he responded: “One hundred percent.”³⁵

3 At trial, Jesus Lera identified Rankin on direct as “an individual that was among the two people
 4 that robbed [him] that evening.”³⁶

5 Lera’s identification-related testimony on cross-examination was not exceedingly strong.

6 When asked what the first robber looked like, Lera responded initially: “It’s been a long time.
 7 I don’t remember that. I remember some.” He testified that the first robber was wearing a blue shirt.
 8 Defense counsel then asked him about his statement to the police at the hospital that the first robber
 9 instead was wearing a burgundy shirt. Lera, ultimately, acknowledged the prior inconsistent statement
 10 but stated: “Yeah. Well, it’s been so long. I don’t remember that much.” He then stated: “I remember
 11 telling him it was kind of burgundy or blue,” despite what the transcribed statement reflected. When
 12 asked a direct question of whether the second robber was thinner than the first, he responded: “I was
 13 very nervous. I didn’t know to stay or to run.”³⁷

14 Lera also responded somewhat evasively and vaguely when defense counsel inquired regarding
 15 his prior response to the police as to whether he would be able to identify the robbers:

16 Q. Okay. Didn’t you in fact tell the police officers that you weren’t
 17 even sure you would be able to recognize either one of these
 18 guys if you saw them again?

19 A. I cannot tell you. I’m scared, very frightened.

20 ³⁵#29, Ex. 28, at 90-91 & 105-14. Sangines’ trial testimony does not unambiguously establish that he told the
 21 police at the hospital that the second robber was wearing a black shirt and pants. See *id.*, at 90 & 108. The Court notes
 22 in passing that his transcribed statement from July 3, 2004, reflected that he told the police that the second robber was
 23 wearing a black T-shirt and black pants. #28, Ex. 2, at 7. The Court’s harmless error assessment is directed instead to
 24 the evidence as it was presented at trial.

25 With regard to the evidence that actually was before the jury at trial, Mario Sangines did not testify as to any
 26 prior identifications of Rankin as the second robber. He was asked specifically only whether he had “been asked to
 27 identify suspects from a group of photographs,” to which question he responded “no.” #29, Ex. 28, at 110. It has been
 28 suggested at one time or another, as referenced *infra* in the discussion of amended Ground 1, that Sangines may have
 looked in the courtroom and seen Rankin in jail clothing at the preliminary hearing. The Court’s focus with particular
 regard to Grounds 2 and 3(c), however, is on the evidence actually before the jury at trial.

³⁶#29, Ex. 28, at 125-26.

³⁷#29, Ex. 28, at 126-30.

1 Q. Understandably, but the question was you did tell the police
2 officers that you didn't know whether you would be able to
3 identify either of these people, didn't you?

4 A. I remember telling them that if I saw him, yes.

5 Q. [Counsel then has the witness read the relevant portion of his
6 police statement.]

7 So on the night you were being interviewed at the
8 hospital you told the officers you didn't know if you
9 could recognize these guys if you saw them again,
10 correct?

11 A. Okay. I remember I was very frightened and since I've got
12 family, that might have played a role.

13 #29, Ex. 28, at 135-36.

14 The State had asked both Vincent Sangines and Mario Sangines on redirect how sure they were
15 of their identification of Rankin, prompting their responses of a "hundred percent." The State declined
16 the opportunity to ask Jesus Lera any questions on redirect.³⁸

17 The trial evidence fairly consistently established that the area where the post-midnight robbery
18 occurred was not well lit. There was a light on the back side of the apartment building directing light
19 east and west, with the parking area being immediately to the north of the building. This light did not
20 appear to shine directly down fully underneath the awning under which Sangines parked his vehicle.
21 The vehicle lights were off during the robbery.³⁹

22 Officer Hinote, who took Rankin into custody, testified at trial: "I know he's about 5'7", maybe
23 170." What was referred to at trial simply as "the SCOPE printout" reflected that Rankin was 5'6" tall
24 and weighed 145 pounds. When Officer Hinote was asked whether those measurements were consistent
25

26 ³⁸#29, Ex. 28, at 136.

27 With regard again to the evidence that actually was before the jury at trial, Jesus Lera did not testify as to any
28 prior identification of Rankin. He was asked only whether he had been asked to pick an individual out of a group of
photos or a group of people. #29, Ex. 28, at 136. Lera identified Rankin at the preliminary hearing in response to a
question of whether he saw anyone in the courtroom "that pointed the gun at you that night on July 3." #28, Ex. 10, at 42
(along with testimony at page 44 of the transcript that the second robber pointed a gun at him). The Court's focus with
particular regard to Grounds 2 and 3(c), however, remains on the evidence actually before the jury at trial.

³⁹#29, Ex. 28, at 50-51 & 53 (Victor Sangines); *id.*, at 101-02 & 106-07 (Mario Sangines); *id.*, at 129 (Jesus
Lera, with some variation, as in his other trial testimony); #29, Ex. 29, at 37-41 (crime scene analyst).

1 with his observation of Rankin while in close proximity, he replied: “I thought he was heavier than
2 that.”⁴⁰

3 The defense presented expert testimony by Dr. Robert Shomer, Ph.D., a forensic psychologist.
4 He testified regarding the extent to which various factors might impact the reliability of eyewitness
5 identification, including, *inter alia*, cross-racial identification, the impact of having a gun pointed at the
6 victim, the overall emotional excitement of the event, lighting, the identification procedures used, and
7 the time between the event and the identification.⁴¹

8 *Standard of Review*

9 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a “highly deferential”
10 standard for evaluating state-court rulings that is “difficult to meet” and “which demands that state-court
11 decisions be given the benefit of the doubt.” *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011). Under
12 this highly deferential standard of review, a federal court may not grant habeas relief merely because
13 it might conclude that a decision was incorrect. 131 S.Ct. at 1411. Instead, under 28 U.S.C. § 2254(d),
14 the court may grant relief only if the decision: (1) was either contrary to or involved an unreasonable
15 application of clearly established law as determined by the United States Supreme Court based on the
16 record presented to the state courts; or (2) was based on an unreasonable determination of the facts in
17 light of the evidence presented at the state court proceeding. 131 S.Ct. at 1398-1401.

18 A state court decision on the merits is “contrary to” law clearly established by the Supreme
19 Court only if it applies a rule that contradicts the governing law set forth in Supreme Court case law or
20 if the decision confronts a set of facts that are materially indistinguishable from a Supreme Court
21 decision and nevertheless arrives at a different result. *E.g., Mitchell v. Esparza*, 540 U.S. 12, 15-16
22 (2003). A decision is not contrary to established federal law merely because it does not cite the
23 Supreme Court’s opinions. *Id.* Indeed, the Court has held that a state court need not even be aware of
24 its precedents, so long as neither the reasoning nor the result of its decision contradicts them. *Id.*

26 ⁴⁰#29, Ex. 29, at 60-61. A SCOPE printout is a criminal history record used by the Las Vegas Metropolitan
27 Police Department.

28 ⁴¹#29, Ex. 33, at 3-60.

Moreover, “[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous.” 540 U.S. at 16. For, at bottom, a decision that does not conflict with the reasoning or holdings of Supreme Court precedent is not contrary to clearly established federal law.

A state court decision constitutes an “unreasonable application” of clearly established federal law only if it is demonstrated that the state court’s application of Supreme Court precedent to the facts of the case was not only incorrect but “objectively unreasonable.” *E.g., Mitchell*, 540 U.S. at 18; *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

To the extent that the state court’s factual findings are challenged, the “unreasonable determination of fact” clause of Section 2254(d)(2) controls on federal habeas review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires that the federal courts “must be particularly deferential” to state court factual determinations. *Id.* The governing standard is not satisfied by a showing merely that the state court finding was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA requires substantially more deference to the state court’s determination:

. . . . [I]n concluding that a state-court finding is unsupported by substantial evidence in the state-court record, it is not enough that we would reverse in similar circumstances if this were an appeal from a district court decision. Rather, we must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record.

Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless rebutted by clear and convincing evidence.

The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled to habeas relief. *Pinholster*, 131 S.Ct. at 1398.

Discussion

Ground 1: Identification Testimony

In amended Ground 1, petitioner alleges that he was denied due process when the identification testimony of Mario Sangines and Jesus Lera was admitted despite allegedly unreasonably suggestive identification procedures. In current Ground 1, and in the claim exhausted in state court, petitioner has

1 claimed that their identification testimony was the product of a unreasonably suggestive identification
 2 procedure because the first time that they were asked to identify Rankin following the July 3, 2004,
 3 robbery was at the July 26, 2004, preliminary hearing as to Jesus Lera and at trial on April 26, 2005,
 4 as to Mario Sangines. Petitioner alleges that such in-court identifications were inherently suggestive.
 5 In the current claim, as amended, petitioner does not challenge Victor Sangines' identification of Alvin
 6 Rankin as the second robber at a field showup, at the preliminary hearing, and at trial.⁴²

7 The Supreme Court of Nevada rejected the exhausted claim on the ground that the reliability
 8 analysis in *Neil v. Biggers*, 409 U.S. 188 (1972), did not apply to such an in-court identification. The

9
 10 ⁴²See #46, at 10-12 (third amended petition). In the second amended petition, petitioner alleged that Mario
 11 Sangines had made an unduly suggestive out-of-court identification at the time of the preliminary hearing by looking
 12 into the courtroom at the request of the prosecutor. The Court held that this claim was not exhausted because it was
 13 premised upon a factual basis that was diametrically opposed to the factual basis presented in the claim exhausted in the
 14 state courts – that Sangines had identified Rankin for the first time at trial. See #41, at 5-12. *Accord Dickens v. Ryan*,
 15 740 F.3d 1302, 1318 (9th Cir. 2014)(*en banc*)(reaffirming that a claim has not been fairly presented in state court if new
 16 factual allegations either fundamentally alter the legal claim already considered by the state courts or place the case in a
 17 significantly different and stronger evidentiary posture than it was when the state courts considered it). Respondents
 18 further had contended that the ground was unexhausted because it sought to claim that the Victor Sangines identification
 19 testimony was the product of an unduly suggestive identification. Petitioner asserted in response that “any discussion of
 20 Victor Sangines in this Ground was for the purpose of providing factual context only.” #40, at 4.

21 Rankin nonetheless suggests in the third amended petition – after the exhaustion issue already had been
 22 addressed – that a substantive claim challenging the Victor Sangines identification testimony was exhausted in the state
 23 post-conviction petition. #46, at 11 n.5. Therein, he challenged an alleged showup identification by *Mario* Sangines.
 24 The only reference to Victor in the claim is to testimony regarding lighting. Rankin perhaps named the wrong Sangines
 25 brother in the claim, but he did not exhaust a challenge to an alleged showup identification by Victor rather than Mario.
 26 See #30, Ex. 66, at 10E-10F. When exhaustion was being considered, petitioner did not argue that a claim challenging
 27 Victor Sangines' identification testimony was exhausted, instead stating that his testimony was referenced only for
 28 context. A footnote in a pleading is not a motion for reconsideration. The claim is unexhausted.

21 Petitioner “eliminated all references to the out-of-court identification made by Victor Sangines” from the third
 22 amended petition. #46, at 11 n.5. No such claim is before the Court. Petitioner nonetheless again questions the Victor
 23 Sangines identification in the reply, either in or in reference to Ground 1. See #49, at 8, lines 22-23, & 15, lines 3-4.

24 To be abundantly clear, if petitioner makes any further attempt to challenge the Victor Sangines identification
 25 under Ground 1 while also maintaining that he is not doing so, the Court will immediately dismiss the action for lack of
 26 complete exhaustion if there are extant proceedings at that time. Petitioner has had ample opportunity both to argue the
 27 point and to present a petition with only exhausted claims. In short, again saying one thing while doing another with
 28 respect to this claim will get the entire petition dismissed for lack of exhaustion without regard to other issues. The
 Court will regard such an effort as a failure by a represented petitioner to unequivocally dismiss an unexhausted claim
 after having been given *ample* opportunity to do so, resulting in immediate dismissal under the rule of *Rose v. Lundy*,
 455 U.S. 509 (1982). To the extent that petitioner queries the Court's prior action in note 3 of the last pleading, counsel
 must read and follow the order actually issued in the case. The actual order, not “accepted practice,” governs. The
 order clearly directed the filing of a “*motion* for dismissal . . . and/or for other appropriate relief,” not a notice.

1 state high court held that rule in *Biggers* does not extend to such an identification because the presence
 2 of the judge and defense counsel along with the availability of cross-examination provided adequate
 3 safeguards against suggestiveness.⁴³ During the pendency of this action, the United States Supreme
 4 Court held in *Perry v. New Hampshire*, 132 S.Ct. 716 (2012), that an identification that is not procured
 5 under circumstances arranged by law enforcement is not subject to the *Biggers* reliability analysis.
 6 Petitioner has acknowledged that *Perry* “is determinative of the claim raised in Ground One as that
 7 claim currently stands.”⁴⁴ The state supreme court’s rejection of the claim in any event was neither
 8 contrary to nor an unreasonable application of clearly established federal law as determined by the
 9 United States Supreme Court even prior to *Perry* and at the time of the November 13, 2006, state
 10 supreme court decision. *See, e.g., United States v. Domina*, 784 F.2d 1361, 1367-69 (9th Cir.
 11 1986)(“[t]he Supreme Court has not extended its exclusionary rule to in-court identification procedures
 12 that are suggestive because of the trial setting”).

13 Ground 1 therefore does not provide a basis for federal habeas relief.

14 ***Ground 2: Limitation on Cross-Examination as to Gunshot Residue and Blood Spatter Testing***

15 In Ground 2, petitioner alleges that he was denied rights to present a defense and to a fair trial
 16 under the Fifth, Sixth and Fourteenth Amendments because the trial court barred the defense from
 17 establishing on cross-examination that the police had not conducted gunshot residue or blood spatter
 18 testing to determine whether there was physical evidence connecting Rankin to the robbery.

19 The relevant trial evidence is summarized, *supra*, at 2-15. The summary focuses, first, on the
 20 extent to which the second robber possibly may have been exposed to gunshot residue and blood spatter
 21 and, second, on the trial testimony identifying Rankin as the second robber.

22 At trial, defense counsel asked the crime scene analyst: “Have you ever been asked to perform
 23 or have you performed parafin [sic] testing on any subject?” After an objection and a bench conference,
 24 counsel then asked: “Were you requested to perform parafin testing?” The trial court stated: “Excuse
 25 me, I’m going to disallow that.” See #29, Ex. 29, at 41-42.

27 ⁴³#30, Ex. 62, at 1-3.

28 ⁴⁴#52, at 2.

1 At the next break outside the presence of the jury, the court and counsel made a record as to the
2 inquiry being sought, the objection made, and the court's ruling.

3 Defense counsel stated that it would have been the defense's intent at that time to question the
4 crime scene analyst "concerning the performance or non-performance of gunshot residue or parafin
5 testing on the Defendant." He stated that it was his understanding that the trial court had barred the line
6 of questioning "because the Court didn't want the matter to turn into me trying to place the Metropolitan
7 Police Department on trial."⁴⁵

8 It was acknowledged by all during the discussion outside the presence of the jury that no gunshot
9 residue testing had been done.⁴⁶

10 The prosecutor noted that she had objected "to the one question" – as to whether the analyst ever
11 had been asked to perform paraffin testing – on the basis of relevance. She stated that with her
12 objection as to relevance "to that one question," she would submit it.⁴⁷

13 The trial court explained its reason for not permitting the cross-examination as follows:

14 The reason I disallowed the question or the line of questioning is
15 that I did not think it was relevant to this case and it was – there was a
16 very distinct possibility of misleading the jury.

17

18 I think there was a distinct disservice to the truth, to the process
19 of finding the truth by bringing this out. Let me explain my thinking.

20

21 Assuming that [there was no evidence that tests were performed,
22 as appeared to be the case], . . . there is very definitely a danger that the
23 jury would be left with the impression that somehow the Metropolitan
24 Police Department was remiss in their investigation or they shirked the
25 responsibility that ordinarily would be theirs to perform such tests.

26 I mentioned at the bench we're not putting Metro on trial here.
27 That's a rather glib way of explaining my thinking at the time. I didn't
28 have time to go into all the particulars.

26 ⁴⁵#29, Ex. 29, at 62-63.

27 ⁴⁶#29, Ex. 29, at 63-64.

28 ⁴⁷#29, Ex. 29, at 64.

1 This would leave the jury with the impression that somehow
2 something should have been done that wasn't and that very possibly
3 there was evidence left out of these proceedings that would exonerate the
4 Defendant, which is clearly erroneous. For that reason I disallowed the
5 question.

6 #29, Ex. 29, at 64-66.⁴⁸

7 Consistent with the trial court's ruling that the defense could not cross-examine the crime scene
8 analyst in a manner that questioned the extensiveness of the police investigation, defense counsel
9 presented no argument in his closing as to the lack of forensic test evidence tying Rankin to the crime.⁴⁹

10 During the closing arguments, the State argued at some length in its rebuttal – in response to a
11 defense argument that Rankin should be acquitted of a charge of attempted murder – *inter alia* that
12 “[c]hances are it had to have been the Defendant who fired that shot.”⁵⁰

13 On direct appeal, defense counsel raised a claim that the trial court had improperly limited the
14 defense cross-examination of the crime scene analyst. Counsel expanded the claim beyond what at least
15 had been explicitly stated in the trial court record. Counsel referred to an effort to cross-examine the
16 analyst as to whether she performed gunshot residue testing “on the skin or clothes” of Rankin. Counsel
17 further stated that it was his “intention to cross-examine the crime scene investigator concerning the
18 performance or non-performance of blood spatter testing on the Defendant’s clothing.”⁵¹ The State did
19 not challenge what at least arguably was an expansion of the claim. The State instead characterized the
20 trial court ruling as one barring the defense “from asking a crime scene investigator whether gunshot
21 residue or blood spatter testing were conducted on defendant.”⁵²

22 The state supreme court decided the claim based upon that characterization of the record.

23 ⁴⁸See also *id.*, at 74-76 (barring the defense from using expert witness testimony to criticize the field showup
24 procedure used by the local police as not being consistent with Department of Justice procedures “because what it
25 suggests is somehow Metro’s procedure is shoddy in their methodology and somehow needs to be criticized,” which the
26 trial court characterized as “nonsense” that “won’t be allowed”).

27 ⁴⁹See #29, Ex. 33, at 74-97.

28 ⁵⁰#29, Ex. 33, at 105-07.

⁵¹#29, Ex. 51, at 12 (electronic docketing page 18).

⁵²#29, Ex. 52, at 6-7 (electronic docketing pages 11-12).

1 The Supreme Court of Nevada rejected the claim as presented on the following basis:

2 . . . Rankin contends that the district court abused its discretion
3 by limiting defense counsel's cross-examination of the crime scene
4 investigators. Citing to United States v. Hoffman and United States v.
5 Pointdexter, Rankin argues that the district court erred by limiting his
6 cross-examination because the lack of physical evidence in the case,
such as gun powder residue and blood spatter, supported his defense that
he was misidentified as the man in close proximity to the shooter. We
agree.

7 A criminal defendant has a right to cross-examine witnesses
8 against him, which includes presenting "any relevant evidence and
9 testimony at trial that someone other than the defendant committed the
10 offense." However, district courts also have the discretion to limit the
11 scope of cross-examination. In this case, the trial court did not allow
12 defense counsel to question the crime scene analyst about the
13 nonperformance of paraffin or blood spatter evidence because it found
14 that the line of questioning was not relevant to the case and posed a
15 "very distinct possibility of misleading the jury." We conclude that the
16 district court abused its discretion by limiting the cross-examination of
17 the crime scene analyst because testimony about the lack of physical
18 evidence and whether police procedures were followed supported
19 Rankin's misidentification defense.[FN10] We further conclude,
however, that any error was harmless beyond a reasonable doubt. The
prejudicial nature of the error was minimal because the
cross-examination of the crime scene analyst would not have revealed
any exculpatory evidence. Additionally, the State's evidence against
Rankin was convincing. We note that Rankin was identified as a
participant in the robbery by three different eyewitnesses. Further,
Rankin was found in the vicinity of the robbery immediately after it
occurred; police described him as sweating profusely, dirty, and having
what appeared to be new lacerations or scratches on his neck and hand.
Although the charged crimes were serious, we conclude beyond a
reasonable doubt that the error in limiting cross-examination did not
undermine the reliability of the jury's verdict.[FN11]

20 [FN10] See generally Harris v. State, 106 Nev. 667, 670,
21 799 P.2d 1104, 1106 (1990) (defendant is entitled to
22 present defense theory of the case); see also
23 Commonwealth v. Miles, 648 N.E.2d 719, 724 (Mass.
24 1995) ("It is well-settled that a defendant has a right to
expose inadequacies of police investigation, and the trial
court should not preclude cross-examination on whether
police procedures were followed.").

25 [FN11] See Chapman v. California, 386 U.S. 18, 24
(1967).

26 #30, Ex. 62, at 3-5 (citation footnotes 5-9 omitted).

27 In the answer, respondents do not dispute the presence of federal constitutional error.

28 Respondents contend that the Court should find the error harmless under the *Brecht* standard.

1 The *Brecht* harmless error standard, delineated further below, applies where constitutional error
 2 has been demonstrated on federal habeas review. Following the Supreme Court’s decision in *Fry v.*
 3 *Pliler*, 551 U.S. 112 (2007), the federal court applies *Brecht* “without regard for the state court’s
 4 harmlessness determination.” *Pulido v. Chrones*, 629 F.3d 1007, 1012 (9th Cir. 2010). That is, the
 5 federal court does not conduct a deferential review under AEDPA of whether the state court’s
 6 determination under the *Chapman v. California*, 386 U.S. 18 (1967), harmless-error standard was
 7 contrary to or an unreasonable application of clearly established federal law. *Id.* Rather, such an
 8 inquiry inherently is subsumed within the analytic framework of the *Brecht* test, such that the federal
 9 court accordingly simply applies the *Brecht* standard directly without regard to the state court’s
 10 application of *Chapman*. *Id.*⁵³

11 As noted at the beginning of this order, the controlling question under *Brecht* is whether the trial
 12 error “had substantial and injurious effect or influence in determining the jury’s verdict.” 507 U.S. at
 13 623. The *Brecht* standard examines whether the constitutional error substantially influenced the
 14 outcome of a case:

15 [I]f one cannot say, with fair assurance, after pondering all that
 16 happened without stripping the erroneous action from the whole, that the
 17 judgment was not substantially swayed by the error, it is impossible to
 18 conclude that substantial rights were not affected. The inquiry cannot be
 merely whether there was enough to support the result, apart from the
 phase affected by the error. It is rather, even so, whether the error itself
 had substantial influence.

19 *Merolillo v. Yates*, 663 F.3d 444, 454 (9th Cir. 2011) (quoting *Kotteakos v. United States*, 328 U.S. 750,
 20 765 (1946)). “Where the record is so evenly balanced that a judge ‘feels himself in virtual equipoise
 21 as to the harmlessness of the error’ and has ‘grave doubt about whether an error affected a jury
 22 [substantially and injuriously], the judge must treat the error as if it did so.’” *Id.* (quoting *O’Neal v.*
 23 *McAninch*, 513 U.S. 432, 435 (1995))(alteration in original)(internal quotations omitted).

25 ⁵³In the federal reply, petitioner argues the issue instead as one of applying the AEDPA standard of review to
 26 the state supreme court’s application of the *Chapman* harmless-error standard and then applying *Brecht* if the state
 27 court’s decision does not withstand review under AEDPA. #49, at 10-11. Such an analysis, along with the pre-2007
 28 case authority cited by petitioner, was superseded by *Fry*. See also *Ayala v. Wong*, ___ F.3d ___, 2014 WL 707162, at
 slip *13 & nn. 13 & 14 (9th Cir. Feb. 25, 2014)(discussion of relationship between AEDPA standard of review and
Brecht analysis).

1 The trial error in the present case consisted of an erroneous limitation on cross-examination that
2 impinged upon the right to present a defense. The trial court prevented the defense from establishing
3 and focusing on the fact that the State had not conducted forensic testing that would have established
4 whether there possibly was physical evidence linking Rankin to the crime. In applying the *Brecht*
5 standard to a trial error of this nature, the Court looks to the strength of the State's trial evidence viewed
6 within a context in which the objective of the cross-examination would have been achieved. That is,
7 the Court looks to the strength of the State's evidence in a scenario in which the defense instead would
8 have been allowed to elicit testimony from the crime scene analyst that the police did not test Rankin's
9 hands or other exposed skin at the time for the presence of gunshot residue and/or blood spatter and did
10 not thereafter test his clothes for the presence of gunshot residue and/or blood spatter.⁵⁴

11 In conducting a *de novo* application of the *Brecht* standard, this Court is not as sanguine as was
12 the state supreme court that the fact that Rankin was identified by all three of the eyewitnesses weighs
13 extraordinarily heavily in the balance. To be sure, the fact that Jesus Lera and Mario Sangines also
14 identified Rankin did corroborate Victor Sangines' identification testimony and bolster the State's case.
15 However, all identifications, including identifications that pass constitutional muster, are not necessarily
16 of equal weight or reliability in terms of weighing the potential effect of a trial error on a jury's verdict.
17 This case clearly was not one where all three men each independently picked Rankin out of a physical
18 lineup or photographic array with multiple individuals of a similar appearance shortly after the incident
19 with no possible inkling of even whether another one of the men had identified a suspect, much less
20 who. That of course would be a situation where each one of three separate and independent
21 identifications would provide fairly compelling corroboration of the other identification testimony.

22
23 ⁵⁴*Cf. Cudjo v. Ayers*, 698 F.3d 752, 768-69 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2735 (2013)(looking to
24 similar criteria). The five factors applied under *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), are not relevant in this
25 context. *Van Arsdall* concerned a limitation on cross-examination directed to impeaching the credibility of a witness, in
26 violation of the confrontation clause. This case concerns a limitation on cross-examination directed to developing non-
27 impeachment evidence in support of a defense argument, in violation of the right to present a complete defense. *Van*
28 *Arsdall* refers to, *inter alia*, the importance of the witness' testimony in the prosecution's case, whether the testimony
was cumulative, the extent to which the witness' testimony was supported or contradicted by other evidence, and the
cross-examination otherwise allowed. These factors have no relevance to the type of error presented in this case. The
defense was not trying to impeach the crime scene analyst's credibility. The defense instead was seeking to use the
crime scene analyst to establish a factual point to be relied upon by the defense in presenting a complete defense.

1 That is not what happened in this case. Rather, without any violation of a rule of sequestration,
2 both Jesus Lera and Mario Sangines readily would have known at the time of both the preliminary
3 hearing and the trial that Mario's brother had identified the defendant in the case as one of the two
4 robbers. And it would be a fair assumption, even without knowing the racial composition of the
5 remaining occupants of the courtroom, that the man who Victor Sangines previously had identified as
6 one of the robbers would be the young black male sitting up front at the counsel table with his lawyer.
7 So, while the in-court identifications by Jesus Lera at the preliminary hearing and by Mario Sangines
8 at trial present no constitutional issue under *Perry*, that does not necessitate a conclusion that the
9 identifications should be weighed as providing compelling corroboration. That conclusion follows
10 especially as to the Jesus Lera identification testimony, given his weak testimony at trial. In assaying
11 the strength of the State's case against Rankin in considering the impact of a trial error, the Court cannot
12 wholly ignore the not unrealistic possibility that the later identifications could have been influenced by
13 the knowledge that Victor Sangines already had identified the defendant at counsel table as one of the
14 robbers. The later identifications do corroborate Victor Sangines' identification, but the Court does not
15 place substantial reliance upon the fact that all three eyewitnesses identified Rankin as a basis for
16 finding harmless error on the record presented in this case. The later two identifications assuredly
17 bolstered the State's case, but not compellingly so on these facts, in a case where identification
18 testimony was the State's *only* direct evidence tying Rankin to the crime.

19 That said, Victor Sangines' identification testimony was strong in and of itself. Sangines did
20 not simply identify the first subject put before him in front of a police cruiser in a field showup. He
21 rejected the first three subjects presented in the first field showup and then thereafter made an
22 immediate positive identification of Rankin as he arrived at the second showup, immediately reflecting
23 that he recognized him as one of the two robbers from a crime that had occurred only moments before.
24 Nor did Sangines simply identify random subjects in front of police cruisers until he had two robbery
25 suspects. With the opportunity to select two suspects from five subjects, he selected only one, without
26 succumbing to any possible internal pressure to pick two suspects because there had been two robbers.

27 Petitioner relies heavily on Victor Sangines' description of the robbers as being 5'10" tall with
28 Rankin instead being only 5'6" tall. However, Mr. Sangines apparently had some difficulty admitting

1 to himself that he was only 5'6" or 5'7" tall. He consistently identified himself instead as 5'10" and *then*
2 stated that the robbers were of the same height as he was. Given that Sangines in truth was only 5'6"
3 or 5'7" tall, he in effect was testifying that the robbers also were – as he testified, “about my size” – 5'6"
4 to 5'7" tall. The jury – which directly observed the witness at trial – was not required to ignore that Mr.
5 Sangines clearly was in denial as to his own height. Nor is this Court required to do so in considering
6 the effect of the trial error on the jury’s verdict.⁵⁵

7 Petitioner otherwise points to not necessarily atypical variances between a witness’ initial
8 description and a defendant’s alleged actual appearance. For example, individuals typically are not
9 called upon to make accurate estimates of other individual’s weight as a regular part of their daily
10 routine. Even the initial custodial officer in the case – who would have had more both training and
11 experience in accurately describing subjects – thought that Rankin weighed more than 145. As
12 identification testimony goes, Victor Sangines’ identification testimony was fairly strong identification
13 testimony.⁵⁶

14 Rankin’s appearance when he initially was taken into custody provided further circumstantial
15 evidence corroborating the identification testimony. Within six minutes of the initial dispatch, Rankin
16 exited the very area that then actively was being searched by canine patrols, and he was continuing in
17 the same direction in which one of the robbers had fled initially. The distance between the robbery
18 scene and the location was one that could be covered on foot in the time involved. Rankin presented
19 with every appearance of an individual who had been running and hiding and/or trying to crawl through
20 or over obstacles in a dark residential setting. His heart was pounding; he was sweating profusely; and
21 he appeared exhausted. Rankin’s clothing was covered with brown dirt on the front of his torso and
22

23 ⁵⁵See text and record cites, *supra*, at 8, 11 & 14-15.

24 ⁵⁶By way of contrast, if Jesus Lera’s trial identification testimony instead had been the principal identification
25 testimony supporting the conviction, a markedly different harmless error issue would have been presented in connection
26 with this trial error.

27 Petitioner challenges the strength of the identification testimony by referring back to the witnesses’ written
28 statements. E.g., #49, at 11(reply). The harmless error analysis instead is directed – when weighing the strength of the
State’s evidence – to the evidence actually before the jury. The content of the written statements is pertinent to that
inquiry only to the extent that such content became part of the trial record that was before the jury.

1 upper thighs, and he had fresh cuts on both his neck and the palm of his hand. He still was sweating
2 profusely and obviously trying to catch his breath moments later when the investigating officer brought
3 Victor Sangines around for a field showup, further reflecting the amount of physical exertion that he
4 had just engaged in. Rankin gave every appearance of someone who had been running from a crime.⁵⁷

5 Against the backdrop of the identification and circumstantial evidence, the testimony sought
6 from the crime scene analyst would not have fundamentally altered the evidence before the jury at trial
7 and would not have called other prosecution evidence directly into question. Without the testimony,
8 the jury had before it a case based only on identification testimony and circumstantial evidence. With
9 the testimony, the jury would have had before it a case based only on identification testimony and
10 circumstantial evidence. The testimony would have established only that the police had not conducted
11 forensic testing that – only possibly and certainly not invariably – could have produced physical
12 evidence linking Rankin to the crime if he had been there. The defense undeniably should have been
13 allowed to focus on the State’s failure to perform forensic testing that possibly might have provided
14 relevant physical evidence. However, if the trial court simply had allowed the questions to be asked,
15 there in truth is virtually nil chance that the trial would have ended any other way on that account, given
16 the relative strength of the evidence against Rankin.

17 The Court does not find that the error had substantial and injurious effect or influence in
18 determining the jury’s verdict.

19 Ground 2 therefore does not provide a basis for federal habeas relief. The Court will grant a
20 certificate of appealability on the claim, however, as jurists of reason could find the rejection of the
21 claim to be debatable.⁵⁸

22
23 ⁵⁷See text and record cites, *supra*, at 5 & 9-11.

24 ⁵⁸The grant of a COA does not signify that this Court is “in equipoise” on the issue. The Court is confident that
25 it has reached the right result for the right reasons, and it is not left either with grave doubts or in equipoise. The Court
26 simply finds under the appropriate standard for a COA grant that jurists of reason could find the issue to be debatable.

27 In the federal reply, petitioner in the main argues that the error was not harmless because the trial court violated
28 Rankin’s right to present his defense. The existence of constitutional error does not *ipso facto* establish that the error
was not harmless. The Court simply notes in passing that petitioner’s argument begs the question. The Court has

(continued...)

1 ***Ground 3(a): Effective Assistance – State’s Alleged “Justify Your Verdict” Closing***

2 In Ground 3(a), petitioner alleges that he was denied effective assistance of trial counsel when
3 counsel failed to object to alleged prosecutorial misconduct in closing argument by the State exhorting
4 jurors allegedly to “justify their verdict” to other jurors if they did not believe the State’s evidence.

5 As the prosecutor neared the end of the State’s closing argument, he compared the witnesses’
6 inability to state and/or recall certain specifics in their descriptions correctly to an individual not being
7 able to correctly recall specific details regarding Da Vinci’s *Mona Lisa*, such as the length of her hair
8 or the color of her dress. The prosecutor then continued:

9 Can you correctly identify and recall with specificity and
10 accurately each of those details?

11 Whether you can or can’t, but whether or not you’re a hundred
12 percent certain or not is there any doubt in your mind when you took a
look at the Mona Lisa you can say with a hundred percent certainty I’ve
seen that before.

13 That’s what each one of those witnesses tells you. “As I look at
14 this man I had an opportunity to see his face and I recognized him. I
recognized him 100 percent.”

15 If you don’t believe them justify to your fellow jurors why it is
16 Jesus Lera isn’t to be believed when he tells you he recognizes the man
that did that to him.

17 If you don’t believe it justify it to your fellow jurors why it is that
18 Mario Sangines is not to be believed when he says with a hundred
percent certainty this is the man who did that to me.

19
20 ⁵⁸(...continued)

21 analyzed the harmless error issue without assigning any burden of proof, production, and/or persuasion to petitioner.
22 See *O’Neal, supra*. The Court’s decision is based on the record, not the argument of counsel.

23 Respondents, in turn, suggest that the crime scene analyst’s testimony would have had to reveal exculpatory
24 evidence for the error to not be harmless. The Court expressly does not base its decision on such a premise. Preventing
25 defense counsel from focusing on the State’s failure to pursue additional forensic testing in a substantially weaker case
26 very well could have a substantial and injurious effect or influence on a jury’s verdict in such a case. See also n. 56,
supra. The trial error was not a *Brady* violation where material exculpatory evidence was withheld. Rather, the error
27 was not allowing the defense to challenge the extent of the State’s investigation in seeking to cast doubt upon whether
the State had performed a thorough enough investigation to establish the defendant’s guilt beyond a reasonable doubt.
28 The question of whether such an error was harmless error turns upon the strength of the evidence otherwise presented at
trial, not upon whether the barred line of questioning would have elicited actually exculpatory testimony. Otherwise, a
failure to allow a defendant to pursue this line of defense – seeking responses that testing had not been done – inherently
never would constitute harmless error because the responses by definition never would be exculpatory. That is not how
the *Brecht* analysis operates in this context.

1 On the prejudice prong, the petitioner must demonstrate a reasonable probability that, but for counsel's
2 unprofessional errors, the result of the proceeding would have been different. *E.g., Beardslee v.*
3 *Woodford*, 327 F.3d 799, 807-08 (9th Cir. 2003).

4 The state supreme court's holding – on the prejudice prong – that there was not a reasonable
5 probability of a different outcome at trial if there had been an objection was not an objectively
6 unreasonable application of *Strickland*.

7 Petitioner contends that the identification testimony could not fairly be said to have been strong.
8 As discussed as to Ground 2, this Court did not view the three identifications as having at least equally
9 substantial corroborating weight in assessing the harmless issue on a *de novo* application of the *Brecht*
10 standard. However, on a deferential review under AEDPA of the state supreme court's determination
11 on the *Strickland* prejudice issue, fairminded jurists certainly could find the state supreme court's
12 reliance upon "the substantial evidence of . . . guilt given the strong identifications of the three victims"
13 to be objectively reasonable. All three eyewitnesses in fact did positively identify Rankin when the
14 question was presented, and Victor Sangines' identification testimony was quite strong, as also
15 discussed as to Ground 2. It was not objectively unreasonable for the state supreme court to regard the
16 three witnesses identifications as substantial evidence, notwithstanding the sundry arguments advanced
17 by petitioner seeking to question the reliability of the identification testimony. That is, petitioner's
18 arguments do not necessarily render the identification testimony at petitioner's trial insubstantial.

19 Petitioner further urges that there was no explanation for why Rankin would be bleeding. He
20 posits that the victim's statements⁶⁰ provide no explanation for his appearance because the statements
21 do not refer to any altercation in which Rankin would have been scratched. The trial evidence clearly
22 reflected that Rankin had fresh cuts on both his neck and the palm of one hand. Fresh cuts readily imply
23 bleeding.⁶¹ That is what the trial evidence reflected occurred as a matter of actual fact – explanations
24 therefor regardless. Petitioner hardly can complain of material prejudice from a reference to facts
25

26 ⁶⁰The prejudice issue under *Strickland* turns upon what was in the *trial evidence*, not on what was in the
27 victims' statements. Petitioner was tried based on the trial testimony, not upon a packet of witness statements.

28 ⁶¹See text, *supra*, at 10. The initial custodial officer took Rankin – at his request – over to the emergency
medical personnel back over at the robbery location first before transporting him to the jail. #29, Ex. 29, at 58-59.

1 actually in evidence. Petitioner in any event overlooks the obvious permissible inference that petitioner
 2 sustained the cuts while running and hiding and/or trying to crawl through or over obstacles in a dark
 3 residential setting while trying to evade canine patrols searching the area.⁶² The jury, the state supreme
 4 court, and this Court have not been restricted to what may be within the four corners of witness
 5 statements that were not of record when instead considering the *trial evidence* and the potentially
 6 permissible inferences that could be drawn from that evidence.

7 Ground 3(a) does not provide a basis for federal habeas relief.⁶³

8 ***Ground 3(b): Effective Assistance – Reference to Rankin as the Shooter in the State’s Rebuttal***

9 In Ground 3(b), petitioner alleges that he was denied effective assistance of trial counsel when
 10 counsel failed to object to alleged prosecutorial misconduct when the State argued in the rebuttal closing
 11 argument that Rankin was the gunman.

12 In the defense closing, counsel in the main challenged the identification testimony, maintaining
 13 that the State had failed to prove beyond a reasonable doubt that Rankin was one of the two robbers.
 14 Toward the end of the closing, defense counsel directed additional argument specifically to the charge
 15 of attempted murder with use of a deadly weapon. Counsel posited:

16 Regardless of who was involved in this crime certainly the
 17 State has failed to prove, beyond a reasonable doubt, that particular
 18 charge of the information.

19 Why do I say that?

20

21 What has the testimony shown?

22
 23 ⁶²See text, *supra*, at 25-26.

24 ⁶³The Court notes in passing that the State’s *Mona Lisa* analogy was off the mark. Identifying a suspect as an
 25 offender typically involves identifying someone with whom one had not been previously familiar. As the defense expert
 26 witness noted, “[a]ll of this [the factors concerning reliability of identifications] would be relatively meaningless if it’s
 27 somebody you know.” #29, Ex. 33, at 22. Many people would be able to pick the *Mona Lisa* out of a lineup of portrait
 28 paintings because it is an image that – for one reason or another – they repeatedly have seen in popular culture over the
 course of a lifetime. They know the image of the *Mona Lisa*. Comparing the jurors’ ability to recognize the well-known
 visage of the *Mona Lisa* to the witnesses’ ability to recognize Rankin therefore was a flawed analogy. The Court merely
 notes this point in passing. No exhausted claim has been presented in this regard, and it further would not appear that a
 failure to raise such an in hindsight debating point would have given rise to prejudice under *Strickland*.

1 The testimony has shown whoever shot this guy, *and nobody*
 2 *really knew or even could tell you who shot Jesus Lara*. Whoever shot
 him had to be within two or three feet of him.

3 #29, Ex. 33, at 95 (emphasis added).

4 Defense counsel then presented argument maintaining that the fact that the shooter shot Lera
 5 only in the triceps at close range undercut any suggestion that the shooter intended to kill Lera.⁶⁴

6 In the rebuttal argument, the State's co-counsel challenged the defense premise that the fact that
 7 Lera was hit in the arm was inconsistent with an intent to kill, given that Lera had been using his arms
 8 to shield his head from being shot. She also referred to the second robber's statements to the other
 9 robber to "shoot him, shoot him." She further argued, *inter alia*:

10 We know the Defendant was the one on that side of the Car. [sic]
 11 Chances are it had to have been the Defendant who fired that shot.

12 If you're unsure as to whether it was the Defendant who fired the
 13 shot, it doesn't matter. You have got different theories of criminal
 liability.

14 He's still equal [sic] responsible.

15 #29, Ex. 33, at 105-07.

16 The state supreme court rejected the claim presented to that court on the following grounds:

17 ... [A]ppellant claimed that his trial counsel was ineffective for
 18 failing to object when the State suggested that appellant was the gunman
 19 during the robbery. At trial, the evidence concerning the gunman was
 20 inconclusive; however during closing arguments the State made
 21 statements that appeared to suggest that appellant was the gunman.
 22 Appellant failed to demonstrate that he was prejudiced. Appellant was
 23 charged as a coconspirator in the robbery, the evidence did not exclude
 him as the gunman, and the jury was instructed that the statements,
 arguments, and opinions of counsel were not to be considered as
 evidence. Further, considering the substantial evidence of appellant's
 guilt, we conclude that the statements in closing arguments did not
 prejudice appellant. Therefore, the district court did not err in denying
 this claim.

24 #30, Ex. 81, at 10-11 (footnote quoting argument quoted herein omitted).

25 The state supreme court's rejection of the claim was not an objectively unreasonable application
 26 of the prejudice prong of *Strickland*.

27
 28 ⁶⁴#29, Ex. 33, at 95-97.

Petitioner argues in the federal reply:

The State's theory of the case generally was that Rankin was the second suspect who was not the gunman. (See Ex. 74 at 24-33.) However, during the State's rebuttal in closing argument, the prosecutor argued that Rankin was the shooter. (Ex. 33 at 102, 106.) #49, at 14.

The Court must observe yet once again that the jury, the state supreme court, and this Court consider the *trial evidence* when adjudicating issues in this case that turn upon what evidence was presented at trial. The exhibit that petitioner cites at Exhibit 74 is the *state post-conviction evidentiary hearing transcript*. What participants from the trial may or may not have said years later at an evidentiary hearing does not establish whether a failure to object to a portion of a prosecutor's rebuttal argument resulted in material prejudice under *Strickland* in light of the *trial evidence*. Where alleged prejudice based upon the trial record is at issue, again, the content of other materials – whether witness statements not introduced in evidence at trial and/or hearing transcripts from years later – has no relevance.

This Court has extensively reviewed the actual trial evidence. Against the backdrop of the actual trial evidence, a statement that “[c]hances are it had to have been the Defendant who fired that shot” hardly was completely lacking in any record support. Under much of the testimony, the second robber, identified as Rankin, was on the same side of the car with Jesus Lera. Under much of the testimony, the second robber also potentially may have had a gun. Under the testimony, it was not conclusively established, even by Lera, that the first robber, rather than the second, shot Lera.⁶⁵ Moreover, on the evidence at trial, petitioner faced potential culpability as a principal regardless.

The Court thus highly doubts that trial counsel rendered deficient performance in the first instance in not objecting to the single sentence of prosecutorial rebuttal argument that forms the basis of Ground 3(b). The Court is abundantly certain, however, that, based on the evidence actually presented at trial, the state supreme court's holding that there was no prejudice from any failure to object was not an objectively unreasonable application of *Strickland*.

Ground 3(b) therefore does not provide a basis for federal habeas relief.

⁶⁵See text, *supra*, at 2-7.

1 ***Ground 3(c): Effective Assistance – Gunshot Residue and Blood Spatter Testing of Clothing***

2 In Ground 3(c), petitioner alleges that he was denied effective assistance of trial counsel when
3 counsel did not have his clothing that had been secured by the police at his arrest tested for gunshot
4 residue and/or blood spatter.

5 Relevant trial evidence is summarized in the text, *supra*, at 2-15; and the discussion of the
6 related substantive claim in Ground 2 in the text at 18-26, *supra*, provides additional background.

7 On state post-conviction review, Rankin filed a *pro se* petition; and he, *inter alia*, moved for
8 appointment of counsel. The state district court held an evidentiary hearing without appointing counsel.

9 The transcript of the evidentiary hearing suggests that Rankin came to the proceeding without
10 an understanding that he then was being brought to court to present his case *pro se*:

11 THE COURT: [The court first addressed petitioner by
12 explaining procedures for questioning of witnesses.] So I don't want you
13 to feel like if you don't ask a question just immediately, you've lost your
14 opportunity; do you understand?

15 THE DEFENDANT: Well, I had put in motions for --

16 THE COURT: Did you understand what I just said?

17 THE DEFENDANT: Yeah, I understand.

18 THE COURT: Okay. You put in a motion for what?

19 THE DEFENDANT: I put my petition for someone to represent
20 me or something pertaining to the law. I really don't know how to
21 prepare the writ and how to do my writ.

22 THE COURT: Well, sir, you need to be prepared to argue. You
23 made a motion to have an attorney assigned.

24 THE DEFENDANT: I did.

25 THE COURT: It was denied.

26 THE DEFENDANT: I did not know that.

27 THE COURT: What's that?

28 THE DEFENDANT: I never gotten nothing back from them.

#30, Ex. 74, at 2-3.

 The court ultimately determined, however, that the counsel motion in fact had not been
calendared and ruled upon previously. The court heard the motion then, asking Rankin to argue it at

1 that time. The court, *inter alia*, inquired of the State's counsel whether he knew of any legal issues that
2 needed briefing or any particular explanation by an attorney. Counsel for the State argued at length that
3 the issues did not require appointment of counsel for petitioner. In response to further questioning,
4 Rankin acknowledged that he had obtained a copy of the trial transcript previously, but he did not have
5 the transcript with him. Counsel for the State offered to loan petitioner a copy for the proceeding that
6 day. The court denied the motion for appointment of counsel and proceeded forward immediately with
7 the evidentiary hearing. Petitioner was required to immediately present his case apparently with no
8 prior knowledge that he was being brought to court that day to present his case *pro se* and further
9 apparently with no legal file materials in hand other than a trial transcript loaned to him during the
10 hearing.⁶⁶

11 When the court thereafter reached the claim corresponding to federal Ground 3(c), a number of
12 responses were made to the claim by the court, counsel for the State, and/or defense counsel.

13 First, the court and counsel posited that forensic testing of Rankin's clothing would have been
14 irrelevant because he was not alleged to have been the shooter. Rankin immediately pointed out that
15 the State had argued in its rebuttal argument instead that he was the shooter. Over the course of the
16 remaining discussion of the claim, which covered a number of points, Rankin sought to find in the
17 loaned transcript where the State had done so, also noting that some of the testimony suggested that he
18 might be the shooter. Counsel for the State ultimately found the pertinent portion of the rebuttal
19 argument. He indicated that they were "stuck" with the "stupid argument," but he disagreed with
20 Rankin's statement that trial testimony suggested that he was a shooter. After a discussion of a number
21 of other points, the state district court moved to the next claim with Rankin still trying to find the
22 supporting record references in the transcript copies loaned to him by the State at the hearing.⁶⁷

23 The first potential basis for rejecting the claim identified at the state evidentiary hearing arguably
24 begged the question. This Court's summary of the trial proceedings herein and the discussion of
25 Ground 3(b) reflects that the State expressly argued in the rebuttal: "Chances are it had to have been
26

27 ⁶⁶#30, Ex. 74, at 3-8.

28 ⁶⁷#30, Ex. 74, at 23-34.

1 the Defendant who fired that shot.” Whether or not that was an intelligent argument, the argument was
2 made by the State to the jury without the State ever disavowing the argument at trial. Moreover, the
3 Court’s summary of the trial evidence clearly reflects evidence supporting an inference both: (a) that
4 the robber identified as Rankin was or at least may have been a shooter; and (b) in all events, the second
5 robber may have been close enough to the shot fired potentially to be subjected to gunshot residue
6 and/or blood spatter.⁶⁸

7 Second, the state court repeatedly suggested to Rankin that the absence of testing inured to his
8 benefit because the lack of testing did not state anything one way or the other. Rankin responded that
9 identification was the issue at trial and negative test results would have helped him prove his innocence,
10 supporting his claim that “I wasn’t there, period.”⁶⁹

11 The second potential basis for rejecting the claim thus also appeared to beg the question. If the
12 test results in fact were to show no supporting physical evidence where such physical evidence at least
13 potentially might be recovered if the subject were present, the results then would have provided
14 circumstantial evidence in support of a defense claim of misidentification.

15 Third, defense counsel stated that challenging the absence of evidence sometimes could be as
16 persuasive and that the defense would run a risk by testing the clothing because positive results would
17 essentially eliminate any misidentification defense. Counsel then discussed gunshot residue testing on
18 Rankin’s hands rather than his clothes. Counsel stated that he was appointed six months into the case,
19 after the public defender’s office had a conflict, and Rankin’s hands could not be tested at that point.⁷⁰

20 Counsel’s testimony in this regard led to the following exchange:

21 THE DEFENDANT: Why hands? You know it is not going to
22 be on the hands. Why don’t you test my clothes? I asked you in court.

23 THE WITNESS: There is a problem if you are standing within
24 close proximity to the shooter that blood spatter or gun residue will get
25 on your clothes. And if it’s —

26 ⁶⁸See text, *supra*, at 2-7 & n.16; 30-32.

27 ⁶⁹#30, Ex. 74, at 27-28.

28 ⁷⁰#30, Ex. 74, at 29-31.

1 THE DEFENDANT: And I told you that it is not -- .

2 THE COURT: Let him finish. Are you finished?

3 MR. PERCIVAL [defense counsel/the witness]: I guess.

4 THE COURT: Go ahead.

5 THE DEFENDANT: I told you I was innocent. Why wouldn't
6 you test it? I told you I was innocent. I had nothing to do with this.
7 Why wouldn't you help me prove my innocence?

8 I asked you to get the clothes tested in court. I've never seen you
9 outside, so it was in court that I asked you.

10 THE COURT: Do you recall the request to have the test done?

11 MR. PERCIVAL: I do not.

12 THE DEFENDANT: Well, I have letters to the Public Defender
13 that I wrote to her and asked her, so she passed that on to you. You sent
14 me my papers so you know that I had it.

15 MR. SIMON [for the State]: That's argumentative, Your Honor.

16 #30, Ex. 74, at 31-32.

17 The state district court thereupon reiterated that "I'm still somewhat at a loss to see what
18 significance this would have," because the other robber was alleged to be the shooter. The court moved
19 to the next claim a short time thereafter with, as previously noted, Rankin still trying to find the
20 references in the loaned trial transcript to the testimony suggesting that he was a shooter.⁷¹

21 The third potential basis for rejecting the claim also, in part, begged the question. The inability
22 to perform gunshot residue testing of Rankin's hands of course had nothing to do with the claim for
23 failing to test the preserved clothing. Moreover, whether the point allegedly was argumentative or not,
24 while substitute counsel was not automatically required to investigate every avenue requested by the
25 defendant, the defendant's alleged communications to original counsel could not be disregarded by
26 substitute counsel simply because they were not made specifically to him. Substitute defense counsel
27 of course had no less obligation under the Sixth Amendment to investigate and contest the State's case
28 coming into the case six months after it was commenced.

⁷¹#30, Ex. 74, at 32-34.

1 Respondents maintain that the state supreme court rejected the claim corresponding to federal
2 Ground 3(c) on the following basis:

3 . . . [A]ppellant claimed that his trial counsel was ineffective for
4 failing to request that a paraffin test be conducted. Appellant failed to
5 demonstrate that his trial counsel's performance was deficient. At the
6 evidentiary hearing, appellant's trial counsel testified that he did not
7 request a paraffin test because there was a long time period between
8 appellant's arrest and his appointment as counsel; thus, he felt that a test
9 would not have revealed anything of value. "Tactical decisions [of
counsel] are virtually unchallengeable absent extraordinary
circumstances" and appellant failed to demonstrate any such
circumstances here. See Ford v. State, 105 Nev. 850, 853, 784 P.2d 951,
953 (1989). Therefore, the district court did not err in denying this
claim.

10 #30, Ex. 81, at 4; #48, at 18.

11 If that indeed was the basis for the rejection of the claim, then the state supreme court's decision
12 clearly was an objectively unreasonable application of *Strickland*. The portion of the decision relied
13 upon by respondents did not simply decide one claim or facet of a claim while not explicitly addressing
14 another claim or facet of a claim. The state supreme court in the above passage instead fundamentally
15 misapprehended the nature of the claim presented. The claim was about testing of clothes, not hands.
16 The passage above begged the question just as did the evidentiary hearing testimony by defense counsel
17 that was relied upon by the state supreme court.⁷²

18 The Court thus will consider Ground 3(c) *de novo* rather than on deferential AEDPA review.

19 _____
20 ⁷²Moreover, petitioner was entitled to effective assistance counsel prior to the substitution of counsel. The
21 issue was not replacement counsel's individual performance in isolation but instead was whether Rankin was denied
22 effective assistance of counsel in the defense of his criminal case. If original counsel *arguendo* provided deficient
23 performance by not securing testing of fungible evidence, it would be no valid answer to the claim that replacement
24 counsel thereafter could not test the evidence because original defense counsel had let the opportunity to do so lapse.

25 The state supreme court did address a claim that "trial counsel was ineffective for not objecting to prosecutorial
26 misconduct in failing to preserve exculpatory evidence" based upon an alleged failure by the State to conduct a paraffin
27 test for gunpowder residue and to preserve his clothing." #30, Ex. 81, at 3-4. However, this, again, in truth was not the
28 claim in question. Rankin was contending – in his petition and in the very same the portion of the evidentiary hearing
that the state supreme court referenced – that defense counsel failed to secure testing of clothing that had been preserved
not that counsel failed to object to a failure to preserve the clothing. An ineffective-assistance claim based upon a
defense failure to test evidence necessarily is premised upon the evidence being available to the defense for testing.

Respondents in all events have not relied upon the passage discussed in this footnote as deciding the claim in
Ground 3(c).

1 On *de novo* review, the Supreme Court's decision in *Harrington v. Richter*, 131 S.Ct. 770
2 (2011), establishes three principles that in large measure direct the outcome as to the application of the
3 performance prong under *Strickland* in this case.

4 First, "[e]ven under *de novo* review, the standard for judging counsel's representation is a most
5 deferential one" under *Strickland*. 131 S.Ct. at 788. That is, while consideration of counsel's
6 performance on AEDPA review may be "doubly deferential," the *Strickland* performance standard
7 nonetheless remains "highly deferential" on *de novo* review. *Id.*

8 Second, "*Strickland* . . . calls for an inquiry into the objective reasonableness of counsel's
9 performance, not counsel's subjective state of mind." 131 S.Ct. at 790. The reviewing court, however,
10 must reconstruct the circumstances existing at the time of counsel's challenged conduct and evaluate
11 the conduct from counsel's perspective at the time. 131 S.Ct. at 789.

12 Third, and most directly applicable to this action, defense counsel does not provide deficient
13 performance in failing to conduct forensic testing, even when requested by the defendant, where defense
14 counsel has reason to question his client's account. As the Supreme Court observed in an analogous
15 setting in *Richter*:

16 Even if it had been apparent that expert blood testimony could
17 support Richter's defense, it would be reasonable to conclude that a
18 competent attorney might elect not to use it. The Court of Appeals
19 opinion for the en banc majority rests in large part on a hypothesis that
20 reasonably could have been rejected. The hypothesis is that without
21 jeopardizing Richter's defense, an expert could have testified that the
22 blood in Johnson's doorway could not have come from Johnson and
23 could have come from Klein, thus suggesting that Richter's version of
24 the shooting was correct and Johnson's a fabrication. *This theory overlooks the fact that concentrating on the blood pool carried its own serious risks. If serological analysis or other forensic evidence demonstrated that the blood came from Johnson alone, Richter's story would be exposed as an invention. An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense. Strickland, supra, at 691, 104 S.Ct. 2052. Here Richter's attorney had reason to question the truth of his client's account, given, for instance, Richter's initial denial of involvement and the subsequent production of Johnson's missing pistol.*

25

26 To support a defense argument that the prosecution has not
27 proved its case it sometimes is better to try to cast pervasive suspicion
28 of doubt than to strive to prove a certainty that exonerates. All that
happened here is that counsel pursued a course that conformed to the

first option. If this case presented a *de novo* review of *Strickland*, the foregoing might well suffice to reject the claim of inadequate counsel

....

131 S.Ct. at 790 (emphasis added).

In the present case, defense counsel's evidentiary hearing testimony, although it digresses into other points, suggests that counsel made a strategic decision to not figuratively "roll the dice" and initiate forensic testing that might eliminate any realistically plausible claim of misidentification.⁷³ The hearing transcript further reflects Rankin's apparently passionate assertions that he was innocent and his pleas that his clothing be tested, at least as made at the time of a hearing two years after the conviction. However, reconstructing the circumstances facing defense counsel prior to trial, it would have been objectively reasonable for counsel to question whether the forensic evidence potentially could be inculpatory despite petitioner's protestations of innocence.

In his initial statement to the police,⁷⁴ Rankin stated that he and a girlfriend had just been dropped off in the alley, that he heard a commotion and for some unexplained reason walked toward the commotion, that he saw a friend Kevin M_____ in a commotion with some "Mexicans," that he saw the light from a gunshot apparently by Kevin, and that Rankin "walked," with the "Mexicans" saying to him "Hey, you . . . now fucker" as he "walked." To be sure, Rankin's account did not violate any laws of physics. And Rankin conceivably may have had an unwise but nonetheless honest propensity to walk toward trouble not involving him rather than away from it, despite a criminal record that would be problematic for him in any such circumstances. However, defense counsel nonetheless had to consider the not unrealistic prospect that Rankin's account simply was a weak and highly implausible *post hoc* explanation for his being present at the scene and being recognized by the victims without actually being the second robber with his friend Kevin.

Moreover, defense counsel further would have to consider Rankin's prior criminal record. He had been convicted of a 1994 armed robbery involving two armed assailants. As reflected by the State's sentencing memorandum, Rankin then was an admitted member of the "State Street Crips;" and

⁷³#30, Ex. 74, at 29-30 & 31.

⁷⁴#28, Ex. 1.

1 at the time of the 1994 robbery he was wearing a ball cap with the initials NTG, for “Northtown
2 Gangster” along with his alias “Capone.” Thereafter, he had violated parole on multiple occasions and
3 had been convicted of multiple drug possession charges, reflecting a possible motive for continued
4 criminal activity. He had other charges pending at the time of the proceedings in this criminal case.⁷⁵

5 Neither Rankin’s statement⁷⁶ nor of course his prior criminal history was in evidence before the
6 jury. Defense counsel did not have to ignore either, however, in making an appraisal of what potentially
7 might happen if he requested forensic testing of Rankin’s clothes for gunshot residue and/or blood
8 spatter. As in *Richter*, based on the circumstances presented to counsel, he had an objectively
9 reasonable basis to question his client’s account.⁷⁷

10 The Court accordingly holds, on a *de novo* review, that petitioner cannot satisfy the deficient
11 performance prong of *Strickland*. That is the result required by *Richter*, even on a *de novo* review.

12 Given that petitioner cannot show deficient performance, the Court has no occasion to consider
13 prejudice, as both must be shown.⁷⁸

14
15 ⁷⁵#29, Ex. 35, at 2-3.

16 ⁷⁶The recording of the statement had become unintelligible, and both the State and defense affirmed that they
17 would not be referring at trial to the statement or what was said during the statement. #29, Ex. 25, at 2-7. Consistent
18 with the Court’s observation in the text, although the issue with the recording perhaps may have rendered the statement
19 transcript inadmissible, defense counsel nonetheless did not have to ignore the transcript of the statement in assessing
20 trial strategy and considering what might happen if he sought to develop the forensic evidence in question.

21 ⁷⁷*Richter* apparently leaves a defendant protesting his innocence and asking defense counsel to obtain forensic
22 testing to corroborate his claim with little recourse if defense counsel could have an objectively reasonable basis to
23 question his account. That is, in such a circumstance, defense counsel does not provide ineffective assistance by not
24 complying with the request where it is conceivable that the testing could inculpate the defendant.

25 ⁷⁸The Court notes that the represented petitioner has not sought in this federal habeas proceeding to secure
26 forensic testing of his clothing, if still available. While *Pinholster* precludes consideration on federal habeas review of
27 evidence that was not before the state courts, that bar applies only where the state court decision withstands review
28 under the deferential AEDPA standard. If the federal court instead considers the claim *de novo*, the *Pinholster* rule is
inapplicable. As the matter stands now, the bare claim by habeas counsel that the test results would be exculpatory
would not establish prejudice on either deferential or *de novo* review. Petitioner of course has the burden of both proof
and persuasion on post-conviction review.

The represented petitioner further has not sought to pursue additional relief following upon the decision in
Martinez v. Ryan, 132 S.Ct. 1309 (2012), regarding the ability to demonstrate cause and prejudice for a procedural
default where the petitioner was not represented by counsel in the state post-conviction proceedings. On the record

(continued...)

1 The Court accordingly will deny relief on Ground 3(c), but it will grant a certificate of
2 appealability on the claim. Jurists of reason would find the rejection of the claim to be debatable.

3 ***Ground 3(d): Effective Assistance – Failure to Secure Defendant’s Attendance***

4 In Ground 3(d), petitioner alleges that he was denied effective assistance of trial counsel when
5 counsel did not ensure his presence at a discussion on the record but outside the presence of the jury of
6 a jury note inquiring as to whether there was a lesser charge for attempted murder.

7 The Supreme Court of Nevada rejected the claim court on the following grounds:

8 . . . [A]ppellant claimed that his trial counsel was ineffective for
9 allowing a hearing to be conducted outside of his presence. A brief
10 hearing concerning the inclusion of a jury instruction regarding a lesser
11 included offense to the attempted murder charge was held without
12 appellant's presence. Appellant failed to demonstrate that his trial
13 counsel's performance was deficient or that he was prejudiced. At the
14 evidentiary hearing, appellant's trial counsel testified that he did not
15 believe that appellant needed to be there to discuss the lesser included
16 offense instruction because he had already discussed the issue with
17 appellant and appellant had decided not to request an instruction on a
18 lesser included offense to attempted murder. Further, appellant was
19 acquitted of the charge of attempted murder. Thus, appellant failed to
20 demonstrate that his presence at the hearing would have had a reasonable
21 probability of altering the outcome at trial. Therefore, the district court
22 did not err in denying this claim.

23 #30, Ex. 81, at 9.

24 The rejection of this claim was not an objectively unreasonable application of *Strickland*.

25 As the state supreme court observed, petitioner was acquitted of attempted murder. Petitioner
26 presents no specific argument that would tend to establish prejudice on this claim. Prejudice is not
27 established simply on the basis that petitioner had a constitutional right to be present at every critical
28 stage of the case. On a claim of ineffective of assistance, petitioner must demonstrate prejudice
satisfying the *Strickland* standard. He provides no specific argument articulating why the state supreme
court’s application of the *Strickland* prejudice standard on this claim was objectively unreasonable.

Ground 3(d) therefore does not provide a basis for federal habeas relief.

78(...continued)

presented, there is no exhausted, non-defaulted, and timely claim before the Court that trial counsel was ineffective for
failing to develop defense witness testimony (such as a girlfriend and/or the friend that allegedly dropped Rankin off)
corroborating the account in Rankin’s statement as to how he innocently happened to be at the scene right as the robbery
was occurring and Lera was shot.

Consideration of Possible Issuance of a Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2254 Cases, the Court must issue or deny a certificate of appealability (COA) when it enters a final order adverse to a petitioner. As to the claims rejected by on the merits, under 28 U.S.C. § 2253(c), petitioner must make a "substantial showing of the denial of a constitutional right" in order to obtain a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). To satisfy this standard, petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." *Slack*, 529 U.S. at 484.

The Court will grant a certificate of appealability as to its rejection of Ground 2 and 3(c) on the merits. The Court remains of the view that its ruling on these grounds was correctly decided. However, the issues are sufficiently debatable by jurists of reason.

The Court will deny a COA as to its denial of Ground 1 (text, *supra*, at 16-18), Ground 3(a) (text, *supra*, at 27-30), Ground 3(b) (text, *supra*, at 30-32), and Ground 3(d) (text, *supra*, at 41).

IT THEREFORE IS ORDERED that all claims in the petition, as amended, are DENIED with prejudice on the merits and that this action shall be DISMISSED with prejudice.

IT FURTHER IS ORDERED that a certificate of appealability is GRANTED IN PART and DENIED IN PART, such that a certificate of appealability is GRANTED as to Grounds 2 and 3(c) but is DENIED as to all other claims.

The Clerk shall enter final judgment accordingly in favor of respondents and against petitioner, dismissing this action with prejudice.⁷⁹

DATED this 21st day of March, 2014.


LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

⁷⁹Petitioner's request for an evidentiary hearing is denied, as review under AEDPA is restricted to the record presented to the state court that adjudicated the merits of the claims. *See Pinholster*, 131 S.Ct. at 1398-1401. Petitioner otherwise has not presented a viable basis for an evidentiary hearing in this matter as to the claim considered on *de novo* review herein, as petitioner cannot establish deficient performance in the first instance on that claim, Ground 3(c).